Supreme Court, U.S.
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No. 79-1834

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1979

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COCA-COLA BOTTLING COMPANY OF MEMPHIS, *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD and
INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN AND HELPERS
OF AMERICA, LOCAL UNION NO. 1196, *Respondents.*

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**On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

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## BRIEF OF INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL UNION 1196, IN OPPOSITION

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LYNN AGEE
HICKS, GILLESPIE, JAMES & AGEE, P.C.
3121, 100 North Main Building
Memphis, Tennessee 38103
(901) 523-0019

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## QUESTIONS PRESENTED

1. The questions presented are properly set forth on page 1 of the Brief for the National Labor Relations Board in Opposition.

2. Petitioner failed, as required by Rule 23 of this Court, to raise any question pertaining to the Court of Appeals decision in Case No. 75-2172, affirming a decision of the United States District Court compelling arbitration.

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---

## OPINIONS BELOW

The opinions are correctly set forth by consolidating page 1 of the Petition and page 1 of the Brief for the National Labor Relations Board in Opposition.

## STATEMENT

In September of 1973 the International Union of United Brewery, Flour, Cereal, Soft Drink & Distillery Workers, (herein "Brewery Workers"), and the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, (herein "Teamsters"), entered into a merger/affiliation agreement.

A chronology of labor union merger activity in the United States reflects that from 1956 through August of 1978 there was a total of 73 mergers involving national labor organizations. Between May of 1971 to August of 1978, 8,112,735 union members had their unions participate in mergers. The merger in question here involved 50,198 Brewery Workers merging with 1,854,659 Teamsters. Janus, *Union Mergers in the 70's: A Look at the Reasons and Results,* Monthly Lab.Rev., Oct., 1978, at 13; Dewey, *Union Merger Pace Quickens,* Monthly Lab.Rev., Jun., 1971, at 63.

Prior to the convention of the Brewery Workers approving the merger/affiliation, the membership of Brewery Workers, Local 196, authorized its business agent to attend the convention and vote "Yes" on the merger (NLRB App. 3a). The merger was approved by the Brewery Workers. On November 16, 1973, Local 196 was issued a new charter as Local 1196 (NLRB App. 4a). The union sent notice to the eight employers with whom it had collective bargaining agreements. *Petitioner, Coca-Cola, was the sole employer who declined to recognize the newly chartered local.* [emphasis added] Petitioner denied receiving notice of the changeover, although the United States Post Office return receipt reflected it received the notice. United States District Court Judge McRae found the notice had been received (Pet. App. 178a).

The Union, faced with the refusal by Coca-Cola to recognize the merger, scheduled an affiliation vote and on or

about February 19, 1974, the union posted notices in several locations, time clocks and bulletin boards near work stations utilized for posting information at the employer's plant (NLRB App. 5a). The notice was addressed to "All Union Members Employed at Coca-Cola" and stated that a union meeting would be held at 2:00 P.M. on Sunday, March 3, 1974 at Teamsters 984 Union Hall. The purpose was stated as:

> Affiliation Vote: The purpose of this meeting is for all union members at Coca-Cola to consider and discuss the question of affiliation of Local Union 196 with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, and to vote in the secret ballot election of the affiliation.

Petitioner illegally removed these notices from the bulletin board, but the union continued to post its notices, and in an effort to notify all employees, handbilled notices to approximately 150 of the employees at Coca-Cola (Pet. App. 152a; NLRB App. 6a). Petitioner, while removing the notices of the union that an affiliation vote was taking place, unlawfully sponsored and circulated a petition attempting to get employees to reject the Teamsters, threatened employees with loss of benefits if they supported the Teamsters, and attempted to get employees to not attend the meetings where the union was discussing and voting on affiliation (Pet. App. 126a).

The eligibility for the March 3, 1974 affiliation election was comprised of anyone who had either signed a Brewery Workers card or a Teamsters card; therefore any of Petitioner's employees who wanted could vote in the election by signing a card (NLRB App. 7a).

A secret ballot election was conducted with the use of a ballot which stated:

> To affiliate with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America.
>
> "Yes" "No"

A voter eligibility list was utilized; only one person at a time was allowed in the secret booth; the ballots were dropped in secured ballot boxes; union members were selected for the tabulation of ballots, and the results of the election were 78 for affiliation; three against; one void (NLRB App. 8a).

Petitioner incorrectly states that in September of 1974 approximately 330 employees signed in support of a petition to decertify Teamsters, Local 1196. The Regional Director rejected that petition, the Cox petition, since Cox had failed to secure at least 30% of the employees in the appropriate collective bargaining unit (Pet. App. 123a). The Krone petition of January-February, 1974 was rejected by the Board because the company had unlawfully assisted Krone in his effort to acquire signatures on the petition and for having illegally encouraged its employees to sign the petition (Pet. App. 122a).

The employees of Petitioner were not denied participation and a voice in the affiliation; the only plebiscite denial was by the illegal coercion that occurred by Petitioner in attempting to interfere with the employees' internal union affairs.

## REASONS FOR DENYING WRIT

### 1. The NLRB and the District Court Applied an Historically Consistent Policy as to Union Mergers and Affiliations.

The Board has consistently held that subsequent ratification of a merger by bargaining unit employees satisfies procedural requirements. *Ocean Systems, Inc.*, 223 NLRB 857 (1976); *Kentucky Power Co.*, 213 NLRB 730 (1974); *Safeway Steel Scaffolds Co.*, 173 NLRB 311 (1968).

An amendment to certification may be filed by a local union to reflect the merger of its international affiliate with another affiliate. See, e.g., *N.L.R.B. v. Pearl Book Binding Co.*, 517 F.2d 1108 (1st Cir. 1975); *N.L.R.B. v. Commercial*

*Letter, Inc.*, 496 F.2d 35 (8th Cir. 1974); *Carpenteria Lemon Assn. v. N.L.R.B.*, 240 F.2d 554 (9th Cir. 1956), *cert. denied*, 354 U.S. 909 (1957); *Dickey v. N.L.R.B.*, 217 F.2d 652 (6th Cir. 1954).

The District court, in ordering arbitration, correctly applied federal labor policy favoring arbitration. *United States Gypsum Co. v. United Steelworkers of America*, 384 F.2d 38 (5th Cir. 1957), *cert. denied*, 389 U.S. 1042 (1968); 492 F.2d 713 (5th Cir. 1974). In *United States Gypsum, supra*, the Court ordered an employer to arbitrate with the union regardless of proceedings before the Board on the question of the union's standing as representative.

Petitioner misunderstands the Board's policy; there is no conflict in Board decisions. The Board has consistently amended certifications in union merger situations for many years. *East Ohio Gas*, 140 NLRB 1269 (1963); *North Electric Co.*, 165 NLRB 942 (1967); *Equipment Manufacturing Co.*, 174 NLRB 419 (1969); *East Dayton Tool & Die*, 199 NLRB No. 115 (1971); *Hamilton Tool*, 190 NLRB 571 (1971); *Standard Brands*, 214 NLRB 72 (1973).

Petitioner cannot rely on *Jasper Seating*, 231 NLRB 1025 (1977); the Board briefly concluded that in a merger of an *independent* with an international, employees who are not members of the union should be permitted to vote in the internal union vote [emphasis added]. That was the first and only Board decision where it had taken such a radical approach to internal union elections as to allow nonmembers to vote. The Board considered the question of nonmembers voting in *Amoco Production Co.*, 239 NLRB No. 182, decided on the same day as the decision herein. *Jasper Seating* was reversed to the extent that it was not consistent with *Amoco*. In any event, in the three decisions involving Coca-Cola's there was no confusion among the Board members as to whether or not, in the present factual situation, a bargaining order is warranted. While Board Members Jenkins and Penello dissented in *Amoco*, Jenkins

because nonmembers did not vote, and Penello because of an "impact of change"; both voted to affirm the bargaining order in *Coca-Cola.* Member Penello, contrary to the claims of Petitioner's brief, in his dissent in *Amoco,* concluded that the facts in *Amoco* created an "impact of change" which warranted a Board supervised election in an independent merger with an international. This Court should note that in the instant decision, Penello, in the Board's decision at 218 NLRB No. 179, voted to affirm the finding of an 8(a)(5) violation; therefore indicating he did not feel there was an "impact of change" that warranted a Board conducted election. Furthermore, Member Jenkins, who in *Amoco* indicated he would allow nonmembers to vote, voted to affirm the 8(a)(5) finding in the instant case, reported at 232 NLRB No. 125. Accordingly, there was uninanimity of all members of the National Labor Relations Board that the merger and affiliation were proper, that there was continuity of the union, and a bargaining order was warranted.

Petitioner is asking this Court to require the National Labor Relations Board to conduct a Board supervised election each time there is an affiliation or merger of unions. This would be a radical change from years of practice by the National Labor Relations Board and would place an impossible burden on an already overworked NLRB.

### 2. There is no Conflict of Circuits

The Sixth Circuit merger decisions, including the instant case, are not in conflict with the Third Circuit or any other circuit. The Sixth Circuit has often considered the question of NLRB bargaining orders following union mergers. *Dickey v. N.L.R.B.,* 217 F.2d 642 (1954); *Union Carbide v. N.L.R.B.,* 244 F.2d 672 (1957); *N.L.R.B. v. Canton Sign,* 457 F.2d 832 (1972); *Tanner Co. v. N.L.R.B.,* 517 F.2d 982 (1975). In *Dickey, Canton Sign* and *Tanner, supra,* the Sixth Circuit denied bargaining orders. In *Union Car-*

*bide, supra,* and the instant care, the Sixth Circuit enforced bargaining orders. The court made factual evaluations whether there was due process of the voting procedure and/or whether there was continuity of the union.

The Petitioner relies on *American Bridge Division, U. S. Steel Corp. v. N.L.R.B.,* 457 F.2d 660 (3rd Cir. 1972), and *N.L.R.B. v. Bernard Gloekler Northeast Co.,* 540 F.2d 197 (3rd Cir. 1976). These cases are distinguishable and turn on their own facts. Cf, *St. Vincent Hospital v. N.L.R.B.,* 621 F.2d 1054, (10th Cir., May 1980).

In *Bernard Gloekler, supra,* members of an independent local voted to affiliate with the pre-existing UAW local. However, the court refused to honor the affiliation because the UAW had recently failed to oust the independent in NLRB representation proceeding and was attempting to circumvent NLRB contract bar rules. In *American Bridge, supra,* there was no secret ballot, no eligibility list, no time for debate. Here, there was no effort to circumvent NLRB procedure and the procedural due process was as exacting as that of any election; (except for Petitioner's efforts to sabotage the proceedings), due notice, secret ballot, eligibility list, open debate, ballot voting, securing of ballots, tally by members, and recording of a vote overwhelmingly in favor of affiliation by the membership.

In the instant case the Board, on its factual examination, approved by the Sixth Circuit, concluded "[T]hat Teamsters, Local 1196 was a continuation of Brewery Workers, Local 196, and there was no justification for Coca-Cola's withdrawal of recognition". United States District Judge McRae, on a factual examination of the question of whether Local 1196 was a continuation of Local 196, answered in the affirmative. Accordingly, the Sixth Circuit and the Third Circuit are applying the same test; whether or not continuity of representation continues. The employer is erroneously attempting to get the Supreme Court to do a

factual analysis. The decisions below of the Board and the District Court turn on their own facts applying an historically consistancy test.

### 3. There is no Conflict with the Decisions of this Court

This Court, in *Carpinteria Lemon Assoc. v. N.L.R.B.*, 240 F.2d 554, 557 (9th Cir. 1956), denied certiorari at 254 U.S. 909 (1957). The Ninth Circuit, in *Carpinteria, supra,* had applied the test:

> Right of a successor union to assume the status of certified bargaining agent held by its predecessor depends on a factual issue—is the new union a continuation of the old union under a new name or affiliation, or is it a substantially new and different organization?

The Court's decision in *N.L.R.B. v. Gissel Packing Co.*, 395 U.S. 575 (1969) cannot be read as a merger or affiliation case which would warrant the Board to conduct elections in each of these situations. *Gissel, supra,* considered under what conditions an NLRB bargaining order is warranted when an employer's unfair labor practices are at certain levels and the extent to which that bargaining order should last.

Petitioner's exuberance in attempting to apply *Gissel* led it to make several inaccurate statements of fact. On page 17 of its Brief, the petitioner states:

> Assuming the premise underlying the Board's decision that there was no change in the bargaining representative, the relationship had been given a reasonable period in which to succeed. Indeed, it had borne fruition in two collective bargaining contracts.

According to the United States District Court and the Board, the employer unilaterally terminated the bargaining relationship in November of 1973 and has continued its refusal to bargain until the present. There was no period

whatsoever for the bargaining relationship to succeed.

Petitioner also more blatantly claims on the same page:

> Indeed, no bargaining had been postponed as a result of the company's action at the time the petition was filed.

The record reflects that the Petitioner would not allow the union's representatives on company property, tore down union notices of meetings, and had established their own agents to persuade employees to not support the union. Bargaining had not only been postponed, but unilaterally cancelled by the Petitioner, including cessation of paying dues to the union. Petitioner failed to recognize holidays that were granted under the collective bargaining agreement or arbitrate grievances arising out of violations of the contract. In spite of those flagrant acts at circumventing the bargaining process and the collective bargaining agreement, Petitioner continued its inaccurate claims in its brief by stating:

> There was no contention of violations of the collective bargaining agreement in effect then except the transfer of holiday and the company's refusal to remit to Teamsters, Local 1196, those dues authorized for checkoff to Local 196.

Petitioner terminated its relationship with the union. No bargaining or contract enforcement could take place. Petitioner grasps and mistakes facts created by its own illegal acts. The presence here of the unchallenged findings and meritorious argument that Petitioner's own illegal conduct in interfering with the union's affiliation vote makes the decisions below right. Petitioner should not be the benefactor of its own misdeeds.

## CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted this 9th day of October, 1980.

HICKS, GILLESPIE, JAMES & AGEE
3121, 100 North Main Building
Memphis, Tennessee 38103

LYNN AGEE
*Attorney for*
INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, LOCAL UNION NO. 1196